FILE COPY.

In the Supreme Court of the United States

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
DEC 21 1906
JAMES H. McKENNEY,
CLERK.

No. 260.

HUGH WALLACE, ET AL., Plaintiffs in Error,

vs.

MRS. ELLA ADAMS, FOR HERSELF AND AS NATURAL GUARDIAN AND NEXT FRIEND OF HENRY McSWAIN AND ROMA McSWAIN, HER MINOR CHILDREN, Defendants in Error.

In error to the United States Circuit Court of Appeals for the Eighth Circuit.

Motion of the Choctaw and Chickasaw Nations Asking Leave to File Brief and Argument as Amici Curiae.

Brief and Argument on behalf of the Choctaw and Chickasaw Nations.

GEORGE A. MANSFIELD,
J. F. McMURRAY,
MELVEN CORNISH,
Attorneys for the Choctaw and Chickasaw Nations.

To the Honorable Judges of the Supreme Court of the United States:

Come the Choctaw and Chickasaw Nations by George A. Mansfield, J. F. McMurray and Melven Cornish, their attorneys, and respectfully represent:

That this case brings directly before this Honorable Court the question of the constitutionality and validity of Sections 31, 32 and 33 of the Act of Congress, approved July 1, 1902, entitled:

"An act to ratify and confirm an agreement with the Choctaw tribe of Indians and the Chickasaw tribe of Indians and for other purposes"

creating the Choctaw and Chickasaw Citizenship Court.

That the said Nations are vitally interested in upholding the constitutionality and validity of such legislation and the validity of the decrees of said court for the reason that several thousand citizenship applicants who were not entitled, were thereby denied citizenship and the right to participate in the distribution of tribal property;

That notwithstanding such interest, they were not made parties, in the trial Court, and had no notice or information of the pendency of the case, and

That from an examination of the record, it will appear that a motion similar to this was presented to the United States Circuit Court of Appeals, for the Eighth Circuit, and the permission herein prayed for, was granted.

Wherefore, your petitioners, the Choctaw and Chickasaw Nations, respectfully ask that they may be heard upon such issues arising in the case as may affect

their interests, by the filing of a brief and argument or otherwise, as the Court may deem proper.

THE CHOCTAW NATION AND
THE CHICKASAW NATION, BY
GEORGE A. MANSFIELD,
J. F. McMURRAY,
MELVEN CORNISH,
Their attorneys.

STATEMENT.

The appellee Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, brought an action of ejectment in the United States Court for the Southern District of the Indian Territory at Ardmore, against the appellants. The complainant sets forth that she and her children are members of the Chickasaw Nation or tribe of Indians and that the lands for which they sue had theretofore been duly allotted to them by the Commission to the Five Civilized Tribes. They pray judgment for possession of the premises, allege that the defendants are insolvent and ask that a receiver be appointed to collect rents and hold subject to the disposition of the suit.

The defendant, B. C. Hill, filed an answer in which he denied that he was not a member of any Indian tribe, but alleged that he was a member of the Choctaw tribe of Indians by blood; that he was in possession of the lands sued for and had improved the same, and that he bases his right to hold possession of the lands as a member of the Choctaw Nation or tribe of Indians upon the following facts, substantially detailed in his answer:

That on the 10th day of August, 1896, he applied to the Commission to the Five Civilized Tribes who were acting under authority of the Act of Congress of June 10, 1896, to enroll him as a member of the Choctaw Nation or tribe of Indians, his right to membership in the tribe having been questioned by the Choctaw tribal authorities; that his application for enrollment was signed and sworn to and a copy, together with a copy of all the evidence relied upon, was within thirty days after the filing of his application, furnished to the Governor of the Choctaw Nation; that his application was acted upon by the Commission and membership in the tribe denied him, and thereafter, he appealed from the finding of the Commission to the United States Court for the Southern District of the Indian Territory at Ardmore, and that on the 8th day of March, 1898, in cause number 149, and entitled "J. M. Hill, *et al.*, *vs.* The Choctaw Nation," a judgment was rendered by that court admitting the defendant, B. C. Hill and others, to citizenship in the Choctaw Nation or Tribe of Indians.

He then recites, in substance, the establishment by Congress of the Citizenship Court and sets forth the decree of the court rendered in the test case provided by law entitled: "The Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle, *et al.*," alleges that he was not a party to the proceedings before that court; that no notice was served upon him; that the court was without power to pass upon his right or vacate the judgment secured by him in the United States Court for the Southern District of the Indian Territory and that therefore he was not in any way affected thereby; that he appeared before the Commission to the Five Civilized Tribes, exhibited a certified copy of

the decree of the United States Court for the Southern District of the Indian Territory, admitting him to citizenship in the Choctaw Nation or tribe of Indians and asked to be enrolled as a member of that tribe; that the Commission refused to so enroll him and still so refuses upon the ground that the decree of the Choctaw and Chickasaw Citizenship Court vacated and annulled the decree of the United States Court for the Southern District of the Indian Teritory, declaring the said B. C. Hill to be a member of the Choctaw tribe of Indians. He further says that on the 15th day of September, 1904, he appeared before the Commission to the Five Civilized Tribes and demanded the right to select the lands sued for in this suit for his allotment and demanded that the same be allotted to him as a member of the Choctaw Nation or tribe of Indians and that this request was refused; that he then asked permission from the Commission to file a contest, contesting the right of the plaintiffs to allot the lands and that this request was, by the Commission, without authority of law and without investigation, refused.

He then states that the Commission would enroll him as a member of said tribe of Indians and would allot said lands to him except for the fact that the members of the Commission hold that the judgment of the Choctaw and Chickasaw Citizenship Court vacated the judgment of the United States Court for the Southern District of the Indian Territory, admitting the said B. C. Hill to citizenship in the Choctaw Nation. The answer of the defendant, B. C. Hill, concudes with a prayer that the "cause be transferred to the Equity Docket; that the filing of the plaintiffs upon said lands be cancelled; that he be declared to be the owner of said lands; that he be quieted in his title

to the possession of the same; for his costs and all other proper relief." The other defendants adopt the answer of Hill as their own.

The plaintiffs filed a demurrer to the answer, stating that the same did not set up facts sufficient to constitute a defense to the complaint, which was by the court sustained and the defense refusing to plead further, judgment was rendered in accordance with the prayer of the plaintiff's complaint.

The plaintiffs in error thereupon appealed to the United States Court of Appeals for the Indian Territory which sustained the finding of the lower court. The case was then taken by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit and thence to this Court. The decision of the Circuit Court of Appeals was an affirmance of the Indian Territory Court of Appeals and likewise of the United States Court for the Southern District of the Indian Territory.

The issue sought to be raised by this proceeding is the constitutionality of the Act of July 1, 1902 (32 stat., 641, 646–9), creating what is known as the Choctaw and Chickasaw Citizenship Court, and authorizing it to review the judgments of the United States Courts in the Indian Territory admitting persons to citizenship and enrollment as such citizens in the Choctaw and Chickasaw Nations, said cases having been appealed to said courts from the Commission to the Five Civilized Tribes by authority of the act of Congress of June 10, 1896 (29 Stat. 321–339).

By this Act Congress pursued its plan of extinguishing the tribal title to lands in Indian Territory, and of allotting the same to the members of the tribes, with a view of ultimately making a state out of the area embraced in the lands of the tribes, and authorized

the Dawes Commission to hear and determine the applications of all persons whose rights were denied by the tribal authorities to be enrolled as citizens of said tribes. The Commission was authorized to administer oaths, compel the attendance of witnesses, send for persons and papers, etc., "and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming said citizenship, or to protect any of said nations from fraud or wrong." It was also provided by the Act of June 10, 1896, that the tribes or any person aggrieved with the decision of the tribal authorities or the Commission, might appeal to the United States District Court whose judgment should be final. The Commission was required to make up from these different sources a roll of the citizens of the tribes and to file the list of persons as they finally approved them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities as to who were members of the tribes.

In exercising the appellate jurisdiction conferred upon them by the act of June 10, 1896, the United States Courts in Indian Territory did not limit their inquiry to a review of the citizenship cases appealed thereto from the Dawes Commission upon papers and evidence submitted by that Commission, but examined such cases *de novo* upon evidence taken before the commissioners appointed for that purpose. As a result it was claimed by the Choctaw and Chickasaw Nations that opportunity was given for the commission of fraud and perjury by numerous persons commonly called "Court Claimants," who wrongfully sought admision into said tribes, and whose applications had been denied by the Commission to the Five Civilized Tribes.

The Choctaw and Chickasaw Nations accordingly filed protests with the Dawes Commission against the enrollment of all such persons as members of their respective tribes, alleging illegality and fraud in the procurement of the judgments and further, that because of the failure to give notice of such proceedings to both nations and for other irregularities, the judgments were void.

By a provision in the Indian Appropriation Act of July 1, 1898, (30 Stat. 591), inspired, to be inferred from later events, by dissatisfaction with the proceedings of the United States Courts in Indian Territory in such cases, an appeal was allowed to either party from these courts in all citizenship cases to the Supreme Court of the United States upon all questions involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands in the Indian Territory.

In Stephens *versus* the Cherokee Nations, 174 U. S. 445, however, it was held that the appeal given by this act was restricted to the determination of the constitutionality and validity of the legislation by Congress affecting citizenship or the allotment of lands in the Indian Territory, and did not extend to a review of either class of cases upon their merits. The constitutionality and validity of the legislation was upheld.

In pursuance of a further attempt to prevent the "Court Claimants" from being enrolled, certain individual members of the Choctaw and Chickasaw Nations endeavored to sue for themselves and all other members of said tribes, and filed a bill in equity in the United States Court for the Southern District of the Indian Territory, against Goodall and others, referred to in the brief of appellants. It is not perceived, how-

ever, that this suit could have any bearing upon the present case other than as an indication of the deep sense of wrong and injustice which the members of the Choctaw and Chickasaw nations had in reference to the action of the United States courts in admitting the persons commonly known as "Court Claimants" to citizenship.

These matters being called to the attention of the Secretary of the Interior by protests and briefs filed by the attorneys of the two tribes, he directed the Dawes Commission to negotiate a supplementary agreement with the Choctaw and Chickasaw Nations. Such treaty was made on the 7th of February, 1901. In transmitting it to Congress for approval the Secretary of the Interior stated that experience had demonstrated that the Atoka Agreement (Act of June 28, 1898), was faulty and did not work to the satisfaction of the Indians or the public, and that there was pressing reason for supplementing it by another and further agreement; and, referring to the citizenship judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory, he said:

"Believing that the questions affecting the validity and rectitude of these judgments deserve judicial investigation and scrutiny, article 8 has been redrawn, as is shown in the amended draft of the agreement, so as to provide for a fair, speedy and final decision of these questions by judicial tribunals."

This agreement was not transmitted in time to be acted upon by Congress at that session and the Secretary of the Interior directed the Dawes Commission to negotiate another agreement along the same lines to be submitted to the 57th Congress at its first ses-

sion. This last agreement, which provided for the creation of the Choctaw and Chickasaw Citizenship Court and authorized the review of the citizenship judgments in question, was concluded between representatives of the United States and the Choctaw and Chickasaw Nations on March 21, 1902, and ratified and confirmed by Act of Congress of July 1, 1902, (32 Stat. 641). The provisions of the same in reference to the Choctaw and Chickasaw Citizenship Court which it is thought necessary to consider here, as follows:

"27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats. 495), and the act of Congress approved May 31, 1900 (31 Stats., 221), except as herein otherwise provided: *Provided*, That no person claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the Act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

"Sec. 31. It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such courts being given to each of the said nations; and it being insisted by said nations that, in such proceedings,

notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said Act of June, 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial *de novo* of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within 90 days after this agreement becomes effective, by a bill of equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit: but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizen-

ship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceeding in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. (In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review, and revise all such judgments, both as to *findings of fact* and *conclusions of law*, and may, wherever in its judgment substantial justice will thereby be subserved, permit either

party to any such appeal to *take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy.* And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this Act by Congress.

"33. A court is hereby created to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have the powers of a Circuit Court of the United States in compiling the production of books, papers and documents, the attendance of witnesses, and in punishing contempt. Except wherein otherwise expressly provided, the pleadings, practice, and proceedings in said court shall conform (as near as may be), to the pleadings, practice and proceedings in equity causes in the Circuit Courts of the United States. The testimony shall be taken in court or

before one of the judges, so far as practicable.) Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. The judges shall be appointed by the President, by and with the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum, and his necessary and actual traveling and personal expenses while engaged in the performance of his duties. The clerk, stenographer, and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid by the United States in monthly installments. The moneys to pay said compensation are hereby appropriated, and there is also hereby appropriated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, to pay such contingent expenses of said court and its officers as to such secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctaw and Chickasaw nations as the judges may designate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and process issued by said court shall be served by the United States marshal for the district in which the service is to be had. The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are subpœnaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the circuit court of the United States for the western district of Arkansas. No fees shall be

charged by the clerk or other officers of said court. The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations of the suits and proceedings provided for in this and the two proceeding sections shall be incurred under the direction of the executives of the two nations, and the secretary of the interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States."

This treaty and the entire Act of Congress of July 1, 1902, so far as relating to the Choctaw and Chickasaw nations was, in accordance with the provisions contained in said treaty, ratified by a majority of the legal voters of the two Nations at an election held in accordance with the provisions of sections 73 and 74 thereof on September 25, 1902.

The Choctaw and Chickasaw Citizenship Court having been organized, as provided by paragraph 33 of the act, the Choctaw and Chickasaw Nations proceeded under section 31 thereof and filed a bill in equity against J. T. Riddle and nine other persons as representatives of others similarly situated, for the purpose of having all citizenship judgments rendered by the United States Courts in Indian Territory admitting persons

to citizenship or enrollment in the Choctaw and Chickasaw nations annulled, set aside and vacated for the reasons specified in section 31.

The defendants to this test suit and others similarly situated who were made parties thereto, filed answers, all of whom (as appears from the opinion of the Choctaw and Chickasaw Citizenship filed as "Exhibit A" and attached to this brief) admitted that notice was served upon but one of the said nations, and that the citizenship cases appealed from the Dawes Commission were tried *de novo* by the United States Courts, but asserted, notwithstanding, the validity of all such proceedings.

On December 17, 1902, the citizenship court entered its final decree in this test case (attached to this brief and marked "Exhibit B"), in which, after reciting that

"due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity to law," and that

"said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of said defendants who desired to be heard were heard,"

it was held that notice to each of the Choctaw and Chickasaw Nations of the proceedings in the United States Courts in the Indian Territory, acting under the act of June 10, 1904, admitting persons to citizenship or enrollment as citizens, in those Nations respectively was indispensable and that those courts should not have reviewed such cases *de novo* but should have confined their proceedings to a review of the action of the Dawes Commission upon the papers and evidence submitted to them by the Commission. It was

accordingly ordered, adjudged and decreed, that all of said judgments

"in favor of the ten defendants named in the bill in this proceeding, as well as those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid in favor of all persons similarly situated."

be set aside, annulled and vacated. And those "similarly situated" was the appellant B. C. Hill as appears from his answer, setting out the decree of the Citizenship Court and stating that he has been denied enrollment by the Commission to the Five Civilized Tribes, by reason of such decree:

ARGUMENT.

While there are many minor and subordinate questions in this case, there arises one great and controlling question:

"IS THAT PART OF THE ACT OF CONGRESS APPROVED JULY 1, 1902, CREATING THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT AND GOVERNING ITS JURISDICTION, CONSTITUTIONAL AND VALID; AND ARE THE DECREES OF THAT COURT, RENDERED THEREUNDER, REGULAR AND SHOULD THEY BE ENFORCED?"

This great and controlling question appears to arise and be stated, in the pleadings and arguments, in many forms, but when all are considered it is believed the question, as above stated, includes all and is a fair statement of all.

In our brief filed on behalf of the Choctaw and Chickasaw Nations, in the United States Circuit Court of Appeals for the Eighth Circuit, in addition to our views upon this question, we submitted:

First. That the United States Court in Indian Territory was without jurisdiction to entertain a suit in ejectment on behalf of an Indian allottee for possession of his allotment, on account of that provision contained in the Act of July 1, 1902, specifically directing the Indian Agent by summary order, to put allottee Indians in possession of their allotments, and providing that his action to that end should not be interfered with by the writ of process of any Court; and

Second. That it was the duty of the trial judge to have made the Choctaw and Chickasaw Nations parties to the suit under the provisions of Section 12 of the Act of Congress approved June 28, 1898, entitled:

"An Act for the protection of the people of the Indian Territory and for other purposes (30 Stat. 495), as follows:

"Section 2. That when in the progress of any civil suit, either in law or equity, pending in the United States Court in any district in said Indian Territory, it shall appear to the court that the property of any Indian tribe is in any way affected by the issues being heard, said court is hereby authorized and directed to make such tribe a party to said suit by service upon the Chief or Governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

and that because of the failure of the trial judge to act as required by this law, the case should not have been permitted to proceed to final determination.

It was, however, the opinion of the Circuit Court of Appeals upon the first question, that the United States Courts in Indian Territory have jurisdiction of an action of ejectment brought by an Indian allottee against one in possession of his allotment, notwithstanding the summary powers conferred upon the Indian Agent, under the Act of July 1, 1902; and upon the second question as to the interest of the tribes and the propriety of insisting, in the present attitude of the case, that they should have been made parties, the Court held that to be included in the greater and controlling question as follows: "But the lands in controversy here have been allotted to the plaintiffs below. They are no longer the property of the tribes and none of their property can in any way be affected even remotely by this action unless the averments of the answer entitle the defendent to relief. The courts below were of the opinion that they did not, and hence it did not appear to them that any property of the tribes would be affected by the issues in this action. Until their opinions in this regard are overruled it will not so appear, and if they should be, this case must be remanded for testimony and hearing and there will then be ample opportunity for them to consider and determine whether or not the Indian nations should be made parties."

In view, therefore, of these holdings of the Circuit Court of Appeals upon these minor and subordinate questions and of our contention, upon the whole case, that the decisions of the trial and appellate courts upon the great and controlling question as above set out, should be affirmed, we deem it proper to confine our argument thereto; and in doing so we shall include therein such references and answers as we wish

to make to the various contentions of attorneys for plaintiffs in error.

It will appear from an examination of the history of this legislation that the officers of the government are charged with the duty of administering Indian affairs and Congress had become convinced that legislation was necessary in order to protect these Indian wards of the government from fraud and wrong. This conviction took form in the act of Congress of July 1, 1902, and the purpose of Congress is further expressed in paragraph 31 thereof in which the contention of the Nations is stated and the further statement is made that it is desirable to finally determine these questions. In other words Congress, after a careful examination and consideration of the matter and after recommendations by the officers charged with that duty, decided that the establishment of the Choctaw and of the Choctaw and Chickasaw Citizenship Court was necessary and desirable; necessary to do justice to the Nations and desirable from the standpoint of the government, as permitting the administration of the estate of its wards and enabling it to bring to a final and correct conclusion all matters entrusted to its care as guardian.

This was a necessary and proper exercise of the power of Congress. It was necessary to save the Nations from fraud and wrong and Congress had the power to determine what means were necessary to that end.

McCullough vs. Maryland, 4 Wheaton 316-44;
Stephens vs. Cherokee Nation, 174 U. S. 445;
U. S. vs. Kagama, 118 U. S., 375.

And as has been shown, the manner of its exercise is a matter of legislative direction and cannot be controlled by the courts;

Cherokee Nation vs. Hitchcock, 187 U. S. 308.
Lone Wolf vs. Hitchcock, Id 565.

It is contended, however, that the act creating that court is unconstitutional because it is an attempt on the part of the legislative branch of the government to disturb vested rights by setting aside the final decrees of a court of competent jurisdiction.

This has been fully answered by the Circuit Court of Appeals and we set out that part of its opinion in this case which is applicable:

"The Constitution of the United States had been extended over and put into effect in the Indian Territory before the legislation involved in this suit was enacted and counsel for the defendant, Hill, contend that because his judgment of admission to citizenship or March 8, 1898, was by the terms of the act of June 10, 1896, final when it was rendered and he took possession of and improved the land he occupies before June 28, 1898, and because by the act of the latter date, 30 Stat. 498, the right to select this land which was then in his possession as his allotment was granted to him, his right thereto then vested, so that Congress had no power either by direct enactment or by the creation of a commission or court to review or annul his judgment or to deprive him of his right to this allotment. In support of this position they cite *Rutherford* v. *Greenes' heirs*, 2 Wheat. 196; *Gaines* v. *Nicholson*, 9 How. 356; *U. S.* v. *Brooks*, 10 How. 442; *Doe* v. *Wilson*, 23 How. 457; *Crews* v. *Burcham*, 1 Black 352; *Best* v. *Polk*, 18 Wall. 112; *New York Indians* v. *U. S.*, 170 U. S. 1, and *Jones* v. *Meehan*, 175 U. S. 1. The argument is persuasive and it is fortified by the suggestions that the defendant's judgment had been

affirmed by the Supreme Court in 1899 and that the citizenship court was in reality a commission and not a judicial tribunal. But none of the authorities cited contains a decision that one has a vested right in a judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property. The opinions in the cases cited are limited to rulings that grants to designated persons or classes of persons are grants *in praesenti* and that after they have taken effect the rights to the property have vested so that they may not be lawfully destroyed by legislation without compensation. The contention of counsel based upon decisions of this nature fails to give adequate consideration to the origin and character of the defendant's claim, to the nature of the issue determined by his judgment and to the relation of the legislative, executive and judicial departments of the United States to this claim and issue. Prior to the act of June 10, 1896, the right and the power to determine who were the citizens of the Choctaw and Chickasaw nations was vested in those tribes. It was one of the fast-disappearing attributes of the domestic dependent nationality of the Choctaws and Chickasaws, which was vested exclusively in their nations and was guaranteed to them by treaties with the United States. 7 Stat. 333, 334, §4; 11 Stat. 611, 612, art. 8; *Buster* v. *Wright*, 68 C. C. A. 505, 508, 135 Fed. 947, 950. Those nations had rejected the defendant's claim that he was a citizen of the Choctaw nation. That issue had become *res adjudicata* between him and the nations and it was not cognizable by the the judiciary of the United States or of the Indian Territory. No court had any jurisdiction to determine that he was a member of the Choctaw tribe or that he should be admitted to citizenship therein. He was without remedy for the lawful refusal of the Choctaw nation to admit him to citizenship and hence without right to membership in that tribe.

"The United States by its superior might took from the Choctaw and Chickasaw nations the power to determine who their citizens should be, which had been repeatedly guaranteed to them by treaties, and authorized the Dawes Commission and the United States Court in the Indian Territory to decide this issue, by the act of June 10, 1896. Here is the origin of every right of the defendant involved in this action. The maintenance by him of any claim in any court necessarily concedes the power of the legislative department of the Government to create or to revive, and to enforce his demand for citizenship, because without that concession the provisions of the act of June 10, 1896, in this regard, are void and the defendant's claim is conclusively adjudged to be baseless by its rejection by the Choctaw nation. But if the legislative department of the United States had the constitutional power to create or to revive the defendant's claim and to enforce it, it necessarily had the same power to determine whether or not it would revive or enforce it and to select its own method of deciding these questions. It might have determined this issue itself and have declared by direct enactment that the defendant, Hill, was a citizen of the Choctaw nation. It might have empowered a committee, an Indian agent, a commission, a board, or a court, to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely legislative and administrative function and not a judicial one, Congress necessarily had the authority under the Constitution at any time before an allotment of land under its previous acts had been finally made to the defendant and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw nation.

And also:

"The Act of July 1, 1902, 32 Stat 641, which created the citizenship court and authorized it to review the judgment of the United States Court in the Indian Territory of March 8, 1898, in favor of the defendant, was of the same nature. It was but a modification or an amendment of, or an addition to, the method prescribed by the Legislative department of the Government for the determination of the question whether or not the defendant, Hill, was a citizen of the Choctaw nation by its acts of June 10, 1896, 29 Stat. 340, and July 1, 1898, 30 Stat. 591. When it was passed the Dawes Commission to whom Congress had delegated the power to distribute the lands of the tribes had not allotted the land in dispute to the defendant. He had therefore acquired no vested right in it as against subsequent legislation of the United States because until such an allotment was made all the proceedings determinative of citizenship and of distribution which derived their force and effect from the legislative power of the United States alone were necessarily subject to the further exercise of that authority.

"The fact that the effect of the act of July 1, 1902, has been to avoid final judgments of the United States Courts in the Indian Territory, which had been affirmed by the Supreme Court, has not been disregarded. In the rendition of those judgments, however, those courts were not exercising any of the judicial power of the United States conferred by the third article of the Constitution. They were not constitutional, but legislative courts of the United States, exercising a jurisdiction conferred upon them by Congress by virtue of the sovereignty of the nation and of section 3 of article 4 of the Constitution, which empowers Congress to dispose of, and make all needful rules and regulations respecting the territory belonging to the United States. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546; *Benner* v. *Porter*, 9 How. 235, 242, 243; *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655; *Good* v. *Martin*, 95 U. S. 90, 98; *Clinton* v. *Englebrecht*, 13 Wall. 434, 447. In the case last

cited Chief Justice Chase, speaking of the courts of the then Territory of Utah, said: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the constitu- in the Territory of Utah." Now, as the power conferred upon the courts in the Indian Territory and upon the Supreme Court respecting the decision of the question who were citizens of the Indian tribes, was purely legislative and administrative and the entire question still remained subject to congressional action, the legislative department had the same power at any time before allotments were made and the rights of allottees became vested, to disregard or to authorize a review of the decisions of these courts by other tribunals that it would have had to have disregarded or reviewed the decisions of an Indian agent, a commission, or a committee, if it had conferred this power upon them. The decisions, of the Supreme Court in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488, and *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306, adequately sustain this conclusion. In the former case that court expressly decided that the defendant and others who had secured judgments of admission to citizenship, under the act of June 10, 1896, which were final under the legislation in existence when they were rendered, had no vested rights therein or in the lands or property of the tribes to which these judgments would have entitled them, that the subsequent act of July 1, 1898, which gave to the tribes appeals to the Supreme Court from these judgments was constitutional and declared that "the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion of any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." Earlier decisions of that court are to the effect that the legislative department of the Government has ample power by subsequent enactment to grant a new trial or a review by a suitable tribunal of judgments final under the laws in force

when they were rendered. *Sampeyreac* v. *U. S.*, 7 Pet. 222, 235; *Freeborn* v. *Smith*, 2 Wall. 160; *Garrison* v. *New York*, 21 Wall. 196, 204; *Freeland* v. *Williams*, 131 U. S. 405, 412; *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334."

It is also contended that the plaintiff in error Hill is secure in his rights of citizenship and property because the act of 1898 provided that the lands of the tribes should be allotted among the members of the Choctaw and Chickasaw Nations, and his decree of citizenship rendered by the United States Court for the Southern District of the Indian Territory was in force at that time. Attorney for plaintiff in error, in insisting upon this contention seems to overlook the fact that the very law upon which he expresses a willingness to rely, provides, in terms, that the officers of the government shall determine who are Indians and who shall participate in allotment and distribution of tribal property. So it would seem that there is little of advantage to him in referring to the law, since its acceptance by him would carry with it an acceptance of the power of the government to enroll or deny enrollment to all who claim to be entitled to participate.

To adopt the view urged by the plaintiff in error would be to reach the conclusion that because Congress had employed a particular vehicle, the United States Courts in Indian Territory for instance, as a means to enable it to justly and correctly administer this estate that although such action might result in great wrong to the Indians, that Congress would have no power to remedy the wrong thus unwittingly done. The mere statement of the proposition demonstrates the incorrectness of the reasoning. Congress is clothed with

plenary power over these Indian affairs, and in fact it is the sole foundation and source of power in regard to them. It is their guardian and charged with all the duties of a guardian to its wards and this is now so well established that the citation of authorities is not necessary to support the proposition. Let us suppose that Congress instead of vesting the Dawes Commission with jurisdiction to determine citizenship and granting a transfer of the proceedings (denominated appeal for want of a better term), from it to the United States Courts for the Indian Territory, had chosen to inform itself in some other way as to who were citizens of the Choctaw and Chickasaw Nations and had passed an act enumerating the citizens of these nations and stated that they were the only ones entitled to participate in the distribution of the tribal property. Could it be contended for a moment that persons could acquire such a vested right under such an act as to preclude Congress from taking their names from such rolls if it afterward developed that a mistake had been made in placing their names thereon. No one would maintain such a proposition for a moment, yet it might be maintained with as much logic and as much force as the proposition advanced by counsel here. Viewed in the proper light Congress is no more bound when convinced of wrong such as those shown in these cases to let an act of the Commission or the Court stand without further investigation than it would be by its own act. Congress not only has the power but it is clothed with the duty of taking whatever steps seem proper and right to it to insure a fair and just administration of this estate.

Upon this point, however, the language of the court in Stephens vs. Cherokee Nation (174 U. S. 477-478),

cited and largely relied on by the Circuit Court of Appeals in this case, would seem to be conclusive.

"The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language expresses a contrary intention in unequivocal terms the mere fact that the legislation is retroactive does not necessarily render it void.

"And while it is undoubtedly true that legislatures cannot set aside the judgment of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. (Calder v. Bull, 3 Dallas, 386; Sampeyreac v. United States, 7 Pet., 222; Freeborn v. Smith, 2 Wall., 160; Freeland v. Williams, 131 U. S., 405; Essex Public Board v. Skinkle, 140 U. S., 334.)

"The United States Court in Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of its machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments

from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of re-examination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

(See also Cherokee Nation v. Hitchcock and Lone Wolf v. Hitchcock, supra.)

It is further contended by the Attorney for plaintiff in error that the Citizenship Court, in holding that both Nations were necessary parties in the original proceedings before the Commission and the United States Courts and that the action of such United States Courts should have been confined to a review of the proceedings before the Commission and should not have extended to a trial of the cases *de novo*, held the act of 1896 void and thus sought to overrule the Supreme Court of the United States, in the Stephens case.

Such a conclusion cannot be reached with any degree of reason. The fact that the original proceedings under the law of 1896 were held to be void was through no fault or weakness of the law. The fatal defect as to parties arose out of the failure of the citizenship applicants themselves to join the necessary parties in interest, the Choctaw and Chickasaw Nations. The fatal defect as to the erroneous trial of the cases *de novo* arose out of the erroneous construction placed upon the act by the United States Courts. If the applicants by whom the acts were instituted had joined and served the necessary parties and if the United States Courts

had confined their action to a review of the proceedings had before the Commission, the decision of the Citizenship Court, as to the regularity of the proceedings under the law of 1896, would certainly have been otherwise.

An examination of the Stephens case cited above will show that it was confined entirely to a determination of the constitutionality of the legislation by Congress in respect to citizenship and the allotment of lands in the Indian Territory. It assumes, *without determining*, that the act of June 10, 1896, authorized the United States Courts to review *de novo* the cases appealed from the Dawes Commission. The authority of the Congress to authorize such a review was confirmed, and the legislation declared to be, in general, valid and constitutional. The question of notice was not even mentioned in the opinion in that case and the act of July 1, 1902, therefore, which provided for a specific inquiry by the Citizenship Court into the validity of the methods of procedure adopted by the United States Courts in the citizenship cases and for a review of such cases upon their merits, in no way affects the judgment in the Stephens case. In fact, it but supplements the action of the court in that case and serves to complete the purpose of Congress manifested through its legislative act to have the "very right" of the controversy determined.

Various other contentions are made on behalf of the plaintiff in error, which we shall briefly notice, since they all bear upon the great and controlling question in the case herein discussed.

It is urged that the answer of Hill, the defendant in the trial Court, alleges that he was not made a party to the test suit before the Citizenship Court,

known as the Riddle case; that the plaintiffs filed a demurrer to this answer, thus conceding the statements of fact contained in it and that it is thus established in this case, that Hill was not a party to said test suit and that he should not be affected by the decree therein rendered. The weakness of this contention is made plain when it is understood that the answer referred to, to which a demurrer was filed, contains other facts which show conclusively that he was made a party to such suit. It sets out the decree of the Citizenship Court in the Riddle case (which also appears appended to this brief and marked "Exhibit B") in which the Court finds

"* * that due and legal notice of the pendency and prayer of this suit has been given to the defendants herein in conformity of law."

And it is also alleged in said answer that

"* * the said Commission to the Five Civilized Tribes refused and has ever since refused and still refuses, to enroll this defendant as a member of said tribe of Indians, claiming that the 'pretended decree' of the so-called 'Choctaw and Chickasaw Citizenship Court' vacated and annulled the decree of the United States Court for the Southern District of the Indian Territory, declaring this claimant to be a member of the Choctaw tribe of Indians."

It will be remembered that the test suit was, as required by the law against ten persons for themselves and as representing all other persons "similarly situated," that is, all persons whose citizenship cases were passed upon by the United States Courts for the Central and Southern Districts of the Indian Territory, under the Act of June 10, 1896.

The Circuit Court of Appeals takes into consideration this phase of the case and that part of its opinion thereon, is as follows:

"Finally counsel for defendant insist that he is not bound by the decree of the citizenship court (1) because he was not one of the ten persons named as defendants therein, but as Congress had plenary power to directly reverse the judgments of citizenship or to determine in what way they should be reversed, its enactment that the ten persons should stand as the representatives of all others similarly situated was not ineffective; (2) because there was no proof in the citizenship court, and there is no finding in the decree that he was one of the persons similarly situated with the ten defendants named, but the decree avoids all the judgments of the courts in the Indian Territory whereby in cases appealed from the decisions of the Dawes Commission under the act of June 10, 1896, any of the defendants named or any of the persons similarly situated was adjudged a citizen of the Choctaw or Chickasaw nation and the answer of the defendant in this action that upon such an appeal he secured a judgment of one of those courts that he was a citizen of the Choctaw nation sufficiently discloses the fact that he was similarly situated with the ten defendants named in the decree of the citizenship court and brings him clearly within its terms; (3) because the act of 1902 required that notice of the pendency in the citizenship court of the suit there brought and of the time for answering the bill should be published for four weeks in two newspapers generally circulating in the Choctaw and Chickasaw nations thirty days before the time for answering the bill expired, and the decree does not recite or adjudge that this notice was published (32 Stat. 647), but the ten defendants are named in the title of the decree as defendants "for themselves and as representatives of all persons similarly situated, claiming to be members of the Choctaw and Chickasaw nations, by virtue of alleged decrees of

the United States Court for the Central and Southern Districts of the Indian Territory sitting respectively at South McAlester and Ardmore, and commonly known as Court Claimants," the decree recites: "The court finds that due and legal notice of the pendency and prayer of this suit has been given to the defendants herein in conformity of law" and it adjudges that the judgments in favor of those similarly situated as well as the judgments in favor of the ten defendants named and in favor of other defendants who appeared be annulled.

"Counsel concede that the recital in the decree that the notice had been given "in conformity of law" is sufficient in the absence of any inconsistent record or evidence to raise the presumption of the legal publication of the notice and of the jurisdiction of the court over the persons of all who are effected by the decree (*Applegate* v. *Lexington & Min. Co.*, 117 U. S. 255, 269; *Foster* v. *Givens*, 14 C. C. A. 625, 632, 67 Fed. 684, 691; *Beattie* v. *Wilkinson*, 36 Fed. 646; *Rumfelt* v. *O'Brien*, 57 Mo. 569, 572; *Harris* v. *Lester*, 80 Ill. 307, 315; *Mulvey* v. *Gibbons*, 87 Ill. 367, 380; 17 Am. & Eng. Enc. of Law 1082) were it not for the fact that this recital is limited by the words "the defendants herein," but they insist that these words refer to the ten defendants whose names are written in the title of the decree and to them alone. Such a construction, however, is inconsistent with the decree against those similarly situated which could have been lawfully rendered only in case the publication of the notice had been made, and the words "the defendants herein" must therefore be given a broader interpretation and must include those who were similarly situated as well as those whose names were written in the title of the decree.

"The defendant pleaded the decree of the citizenship court in his answer and took upon himself the burden of showing by adequate averments why it did not estop him from asserting that he was a citizen of the Choctaw

nation. He alleged, it is true, that he was not similarly situated with the defendants named in that decree, but he failed to set forth any difference between his situation and that of the ten defendants there named, while his answer disclosed the fact that he had secured a like judgment upon a similar appeal. He alleged, it is true, that he was not a party to the suit in the citizenship court, and that no notice was ever served upon him therein, but he failed to allege that the notice of the pendency of that action was not published in the manner directed by the act of Congress. These averments were insufficient to withdraw the defendant from the estoppel of the decree, and the judgments of the courts in the Indian Territory against him in the action now under consideration must be affirmed."

A further contention is that if the Choctaw and Chickasaw Citizenship Court is not a Court, in the Constitutional sense, it has no power to enforce its decrees and that they are, therefore, not enforcible, and that they may be observed or not as the Commission to the Five Civilized Tribes or the Secretary of the Interior may see fit. That contention is merely the result of the unwillingness of counsel to accept the reasoning of this Court in the Stephens case or of the Circuit Court of Appeals in this case. The Citizenship Court was created by Congress and directed to do certain things in a certain way defined by the law. It could do what the law directed and no more and no less. It was provided that its decisions should be final and in the laws governing the jurisdiction of the Commission and the Secretary of the Interior, in making up the final citizenship rolls are required to enroll such persons as lawfully and rightfully appear upon the tribal rolls and such others as have been duly and lawfully admitted to citizenship. These means Congress saw fit to adopt for carrying out this work and

it is difficult to understand how it can be urged that, instead of this procedure, Congress ought to have adopted some other procedure for the enforcement of these decrees.

Counsel for plaintiff in error, in his criticism of the holding of the Circuit Court of Appeals says that he settlement of these citizenship cases is a legislative and not a judicial matter, calls attention to the decision of this Court in the Stephens case, under the act of July 1, 1898, and inquires with considerable vehemence if, in that case, the Supreme Court was exercising a legislative and not a judicial function.

In that case and under that law the Supreme Court in the exercise of its jurisdiction, followed the law—no more and no less. The law said the decision should be confined to the constitutionality and validity of certain legislation. The jurisdiction conferred by the act had no relation to or connection with, the functions of the court in a constitutional sense; and there has been and will be no disposition upon the part of Congress or the Nations, to question the correctness of the Court's decision in the Stephens case. The determining element in the Stephens case and this case, seems to be persistently overlooked, by counsel for plaintiff in error. It is not a question of drawing nice distinctions as to whether the powers exercised by the various tribunals are judicial or not; but the real question is as to the existence or non-existence of vested rights. This Court decided in the Stephens case that citizenship applicants were not in the enjoyment of such vested rights as precluded an inquiry into their status, in pursuance of subsequent legislation. That is the determining element, likewise in this case, and the decision of the Circuit Court of

Appeals bears this constantly in mind and reaches its conclusions in the light of this Court's decision in the Stephens case.

It appears to us to be clear that Congress has not exceeded its powers and that the legislation is valid and constitutional, and that the proceedings of the Citizenship Court thereunder are regular and that they should be enforced. If there should be, however, a doubt as to its validity, that would not, we submit, be sufficient to justify this court in declaring it unconstitutional. The doubt would be resolved in favor of its constitutionality.

Cooley's Constitutional Limitations, 6th Ed., 216–217, and authorities there cited.

In the case of Fletcher v. Peck, 6th Cranch, 87, 128, Chief Justice Marshall rendering the opinion of the Court said:

"The question whether a law to be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Upon this point Mr. Cooley uses the following language (Cooley's Constitutional Limitations, 6th Edition, page 217):

"The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a coördinate department of the Government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately resolved in its favor, so that the courts may with some confidence repose upon their conclusions, as one based upon their best judgment."

In this case however, it appears that the legislation has been carefully considered by Congress, that the need for such legislation was fully recognized and that it embraced a deliberate conclusion of a co-ordinate branch of the Government which is entitled to great weight by the courts.

McCullough v. Maryland, 4 Wheaton, 316, 423.

It is held that the courts will not inquire as to whether a given measure was necessary to be passed by Congress and in United States vs. Des Moines Navigation and Railway Company (142 U. S. 510, 544), the Court, after quoting from Cooley's Constitutional Limitations, 5th Edition, 222, lays down the rule that in all cases where it appears that Congress had the power to legislate, the courts are not at liberty to inquire into the proper exercise of the power but will assume that it has been properly exercised. To the same effect is Angle v. Chicago, St. Paul, etc.,

Railway Co., 151 U. S., 1, 18; Lindsey and Phelps Co. v. Mullen, 176 U. S., 126, 146; Luther v. Borden, 7th Howard 1, 47; Taylor and Marshall v. Beckham, 178 U. S., 548, 580.

It is therefore respectfully submitted that Sections 31, 32 and 33 of the Act of Congress approved July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court, and defining its jurisdiction, are constitutional and valid; and that the decrees of that court, rendered thereunder, are regular and should be enforced, and that the decisions of the trial and Appellate Courts should be affirmed.

GEORGE A. MANSFIELD,
J. F. McMURRAY, and
MELVEN CORNISH,
Attorneys for
THE CHOCTAW NATION and
THE CHICKASAW NATION.

EXHIBIT A.

IN THE
CHOCTAW AND CHICKASAW CITIZENSHIP
COURT
Sitting at
SOUTH McALESTER,
IN THE INDIAN TERRITORY.
December Term, 1902.

The Choctaw and Chickasaw Nations, or Tribes of Indians, Plaintiffs,

vs.

J. T. Riddle et al., Defendants.

This is a proceeding instituted in this Court by the Choctaw and Chickasaw Nations, or tribes of Indians, against the defendant, J. T. Riddle, and nine others, who are similarly situated. The plaintiffs filed a Bill in Equity in this Court, by virtue of Section 31, of an Act entitled "An Act to Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," approved July 1, 1902, said section being as follows:

"It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in

the Indian Territory, acting under an Act of Congress, approved June 10, 1896, have admitted persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations, respectively, without notice of the proceedings in such Courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States Courts in the Indian Territory, under said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial *de novo* of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly or either of said nations acting separately, and making the other party a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw Citizenship Court, hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship, or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit, as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of the ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw Nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering same, which shall not be less

than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States Courts in the Indian Territory, was wrongfully obtained as provided by the next section. In the event said citizenship judgments, or decisions, are annulled or vacated in the test suit hereinbefore authorized, because of either or both irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

The plaintiffs, after setting out in their bill that certain lands, situated in the Indian Territory, and embracing that portion known as the Choctaw and Chickasaw Nations, as belonging to these two tribes and that by virtue of treaty stipulations heretofore entered into on the part of the United States and these two

tribes of Indians, said lands are held in common by the members of these two tribes, and they further allege that these ten defendants, and several thousands of others similarly situated, have been admitted and placed upon the rolls of these two nations as Indian citizens, by virtue of certain alleged judgments or decrees of the United States Courts, for the Central and Southern Districts of the Indian Territory, under the Act of Congress approved on the 10th day of June, 1896; and by virtue of these said judgments these defendants, and all those similarly situated, are insisting upon enforcing said alleged judgments or decrees and if same are enforced by allotment to them of an equal share of the lands and moneys of said tribes, it will wrongfully deprive the members thereof of property to the value of many millions of dollars, and thereby proportionately decrease the share which each member would otherwise receive.

The plaintiffs further allege, that all of the judgments of the said United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, are illegal and void; that no valid judgments, affecting said lands and moneys, could in any event have been rendered without notice to both of said nations, or tribes; and further allege, that in no case in which judgments were rendered purporting to admit any of said defendants to citizenship in either of said nations or tribes, was notice given of the pendency of said proceedings to each of said nations or tribes, and that in no case was judgment taken against both of said nations, or tribes; and, that due and lawful notice to each of said nations or tribes, was indispensable to the rendition of valid judgments. Plaintiffs further allege, that the proceedings in the United

States Courts in the Indian Territory, under said Act of Congress, approved June 10, 1896, in the rendition of said alleged decrees, should have been confined to a mere review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and that said court should not have tried the cases *de novo*, and that the action of said courts in trying said cases *de novo*, and in rendering the alleged judgments, was illegal and void; and that all of said evidence of a documentary nature, which has become a part of the record of said cases, was unlawfully taken, and that for that reason all of said proceedings are of no force and effect. Plaintiffs further allege, that they have no adequate remedy at law by which they can redress the great wrong threatened them, and they, therefore, pray this court to enter its decree, declaring all such judgments rendered by the United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, illegal and void; and ask this court to declare the proceedings of said court in trying said cases *de novo* in which said judgments were rendered upon appeal from the Commission to the Five Civilized Tribes, illegal and void, and of no force and effect, etc. The plaintiffs further attach to their bill in equity a judgment rendered by the United States Court for the Central District of the Indian Territory, in the case of Elizabeth Casey et al, against the Choctaw Nation, a party who obtained judgment under the Act of June 10, 1896. The attachment is marked exhibit "A," and they ask that it be taken as a part of their complaint, as bearing out their contention that only one nation was served with notice, and that the judgments were taken against one nation alone.

This judgment is as follows:

EXHIBIT A.

Copy of Order of Court.

United States of America,
Indian Territory,
Central District.—ss.

In the United States Court in the Indian Territory, Central District, at a term thereof begun and held at South McAlester, in the Indian Territory, on the 24th day of August, A. D., 1897, present, the Honorable Wm. H. H. Clayton, Judge of said Court. The following order was made and entered of record, to wit:

25.

ELIZABETH CASEY, ET AL.

vs.

CHOCTAW NATION.

Judgment.

On this 24th day of August, 1897, this cause came on to be heard upon the pleadings and evidence produced herein, and the Court being well and sufficently advised in the premises, doth find as follows:

That Elizabeth Casey, aged 58 years; her son, John Casey, aged 25 years; her son, Joshua Casey, aged 23 years; her daughter, Phebe Garrett, aged 37 years; her grandson, Wm. Garrett, aged 19 years; her grandson, John Garrett, aged 16 years; her grandson, Jesse Garrett, aged 12 years; her granddaughter, Dora Garrett Cheatam, aged 17 years; her granddaughter, Mandy Garrett, aged four years; her great-granddaughter, Venice Cheatam, aged 1 year; her grand-

daughter, John Ann Casey, aged 16 years, are Choctaw Indians by blood and have been born and reared in the Choctaw Nation, and are citizens and residents of the Choctaw Nation, and that all of said persons are entitled to be enrolled on the citizenship roll of the Choctaw Nation, and as such citizens they and each of them are entitled to all the rights, privileges, benefits and immunities of Choctaw citizens of said Choctaw Nation, and all such rights and privileges are hereby decreed to them.

It is further ordered and adjudged by the Court that the decision of the Commission to the Five Civilized Tribes of Indians, by which the application of the parties appellant was denied, and from which decision these appellants appealed as provided by law, be and the same is hereby reversed, and it is ordered by the Court that said Commission shall put the names of these appellants on the rolls prepared or to be prepared by it, of citizens of the Choctaw Nation by blood.

It is further ordered by the Court that the Clerk of this Court transmit under his official seal to the said Commission for the Five Civilized Tribes of Indians a true copy of this judgment, which said certified copy shall operate and be taken as a mandate from this Court to said commission.

It is further ordered and adjudged by the Court that these appellants have and recover of and from the Choctaw Nation all their costs in this behalf expended.

(Endorsements.)

The within is a true copy from the record of an order made by said Court on the 24th day of August, A. D., 1897.

(Signed.) E. J. FANNIN, Clerk.

Filed September 6, 1897.

H. M. JACOWAY, Secretary.

No. 75-2.

No. 25—E. Casey et al. vs. Choctaw Nation. Copy of Order of Cou t.

MUSKOGEE, I. T., *Sept.* 24, 1902.

I, Tams Bixby, Acting Chairman of the Commission to the Five Civilized Tribes, do hereby certify the foregoing to be a true and correct copy of a certified copy of an order made by the United States Court in Indian Territory, Central District, South McAlester, I. T., on the 24th day of August, A. D. 1897, in the case of Elizabeth Casey, et al. vs. Choctaw Nation No. 25, as the same appears on file with the records of the Commission to the Five Civilized Tribes.

TAMS BIXBY,
Acting Chairman.

Defendants filed an answer to the plaintiff's bill in equity, in which they admit the judgments described in said bill in equity, were rendered by the Courts mentioned in said bill in equity, under and by virtue of the Act of Congress approved June 10, 1896, but deny that said judgments are illegal and void. They admit that only one nation was served and that the judgments were taken against only one nation, but insist that both of said nations were not necessary parties and that it was not necessary to serve notice of the pendency of said suits, or the notice of application for such citizenship presented to the Commission of the United States to the Five Civilized Tribes, from which appeal was taken to the said Court.

Defendants further insist, that under and by virtue of the Act, approved June 10, 1896, and all other other laws and treaties between the Choctaw and Chickasaw Nations, or Tribes of Indians, that no notice was necessary to have been given to have prosecuted the

application of the defendants for citizenship, and that no judgment against both of said nations was necessary and proper, under the law, to recognize the rights of these defendants in and to citizenship of status recognized or established by virtue of said judgments.

And in answering the other allegations in the bill in equity, the defendants admit that the United States Courts for the Central and Southern Districts of the Indian Territory, rendering such judgments under the Act of June 10, 1896, tried the cases *de novo*, upon an appeal from the Commission to the Five Civilized Tribes, known as the Dawes Commission; but insist that that was the manner in which they should be tried, and deny that said judgments, by reason of the fact that said court heard evidence in addition to that heard before said Commission and tried said cases *de novo*, are irregular and illegal and deny that such trials *de novo* rendered such judgments void, as alleged in said bill in equity. The defendants admit the material facts alleged in the plaintiff's bill, but insist that upon the facts as alleged, these are valid judgments. They contend in their pleadings, as well as in their arguments that under the Act of June 10, 1896, authorizing the Dawes Commission to hear and determine the application of all persons who might apply to them for citizenship in said nations, it was necessary to give but one nation notice, and that the trials should have been had *de novo*, as they were had, before the United States Courts.

By virtue of the provision of Section 31 of the Act of July 1, 1902, Polly Hill and numerous other parties, who claim that they are similarly situated to the ten defendants named in the original bill, upon their application, were made parties to this proceeding, all of

them filing answers to the bill, and, as I understand, admit in their several answers that notice was not served on but one nation, and that the trials in the United States Court for the Indian Territory, upon appeal from the Commission to the Five Civilized Tribes, were *de novo*.

The attorneys representing the plaintiffs and the attorneys representing the defendants in the original action, as well as those attorneys who represent parties who are similarly situated and in consequence thereof, came in and made themselves party defendants, filed in this Court the following stipulation:

In the Choctaw and Chickasaw Citizenship Court, sitting at South McAlester, December Term 1902.

The Choctaw and Chickasaw Nations or tribes of Indians, Plaintiffs,

vs.

J. T. Riddle, et. al., Defendants.

Stipulation.

Come now the plaintiffs, the Choctaw and Chickasaw Nations by Mansfield, McMurray & Cornish, their attorneys, and comes J. T. Riddle and nine other representative defendants, named in the bill of plaintiff herein, as representatives of all other persons similarly situated by C. B. Stuart, C. C. Potter, J. G. Ralls, W. A. Ledbetter, A. C. Cruse, Thomas Norman, J. C. Thompson, Sylvester Mullen, C. L. Herbert, and Charles McPherren, their attorneys, and file this their stipulation, agreeing that this Court may consider as before the Court for consideration, the Constitution of the Choctaw and Chickasaw Nations or Tribes of Indians and all their printed laws passed by their legislatures or General Councils from time to time,

together with all treaties made and entered into by said tribes with the United States of America and the Rules of the Commission to the Five Civilized Tribes in 1896. This stipulation, however, shall not be taken as an admission of either party, plaintiff or defendant, as to the validity of any of said Constitutions, or legislative acts of the Choctaw or Chickasaw Nations, or of any of the treaties aforesaid, it being intended that all proper exceptions to the legality of any of said matters so judicially taken notice of, shall be open for argument and discussion by either party.

Attorneys for Plaintiffs:

Mansfield, McMurray and Cornish.

Attorneys for defendants:

C. B. Stuart, A. C. Cruse, W. A. Ledbetter, C. L. Herbert. C. C. Potter, J. G. Ralls, Chas. S. McPherren, T. W. Neal, Warner & Buckley, Harley & Lewis, Thomas Norman, J. C. Thompson and Sylvester Mullen.

Opinion by Adams, C. J.

It will be seen by reference to Section 31 of the said Act set out in the statement of the case, that so far as this suit is concerned, this Court is limited to the consideration of two legal propositions and two alone, and it is expressly confined to these two propositions, to wit: Whether, under the Act of Congress, approved June 10, 1896, notice to each of said nations was indispensable; and second, whether or not the proceedings had in the United States Courts, in the Indian Territory under said Act of June 10, 1906, should have been confined to a review of the acts of the Commission to the

Five Civilized Tribes upon the papers and evidence submitted to such commission. The pleadings and arguments admit there was but one nation served with notice, and also that the trials were *de novo*. Then we come to the consideration of the questions, was it indispensable under the Act of June 10, 1896, to give both nations notice, and should the trials have been *de novo*, or confined to a review of the action of the Dawes Commission?

We will take these questions up in order in which they come.

First: Was notice, under the Act of June 10, 1896, indispensable? That is the issue plainly stated. To arrive at an intelligent conclusion of ths matter, we deem it right and proper, in considering the meaning of the Act of June 10, 1896, to consider why this Act was passed. What wrongs did Congress intend to correct, if any? And what remedies, if any, it sought to apply? In considering this we shall look at the legislation that Congress had enacted prior to that time upon this subject, for the purpose of determining why the Act of June 10, 1896, was passed, and also what these judgments that were obtained under this said Act conferred. What were they dealing with? We shall also take into consideration, in determining these matters as to whether these nations both should have been parties, what rights these judgments conferred, and whether, as a consequence of these judgments, the parties who obtained them were entitled to such rights in the property belonging to both nations as would require notice to both nations, in dealing with their property.

On March 3, 1893, Congress of the United States passed an Act authorizing the President to nominate

and by and with the consent of the Senate, to appoint three Commissioners to enter into negotiations with the Cherokee Nation, the Choctaw and Chickasaw Nations, the Muskogee or Creek Nation, and the Seminole Nation for the purpose of extinguishment of the national or tribal title to any land within the Territory now held by any or all of said nations, or tribes, either by the cession of same, or some part thereof, to the United States, or by the allotment and division of the same in severalty among the several nations, or tribes, respectively, as might be entitled to the same; or by such other method as might be agreed upon between the several nations, or tribes, aforesaid, or each of them, and the United States, with a view of such adjustment upon a basis of justice and equity, as might, with the consent of said nations or tribes of Indians, so far as might be necessary, be requisite and suitable to enable the ultimate creation of a state of the Union, which shall embrace the lands within said Indian Territory. In the Act, Congress declared the purpose of creating this Commission, and to carry out this purpose, it enacted that such Commission, under such regulations and directions as should be prescribed by the President, through the Secretary of the Interior, should open negotiations with the several nations of Indians, as aforesaid, in the Indian Territory, and should endeavor to procure—First, such allotment of lands in severalty to the Indians belonging to each of the said nations, tribes or bands, respectively, as may be agreed upon as just and proper, and to provide for each of said Indians a sufficient quantity of lands for his or her needs, in such equal distribution and apportionment, as may be suited to the circumstances, under the terms of said agreement. Second, to procure the cession,

on such terms as shall be agreed upon, of lands not found necessary to be allotted or divided, to the United States. Congress further provided in this same Act, that the Commissioners—meaning the Dawes Commission—should, from time to time, report to the Secretary of the Interior the progress of its negotiations.

So we are at once to conclude that the purpose of this Act was to send three disinterested persons here as representatives of the Government, to negotiate with these five tribes and get them to agree, if they could, to an allotment of these lands, so that each Indian would hold his share in severalty, and thereby have a home; and with the ultimate result of creating a state.

This was the purpose, for Congress has stated as much in the Act. We have a right to assume these Commissioners discharged their duty; that they came here and attempted to negotiate with the Five Tribes and made their report to the Secretary of the Interior as they were directed. We find in the statement of the case of Stephens et als. vs. Cherokee Nation, which is found in the 174th U. S., page 445, that the Dawes Commission did make reports to the Secretary of the Interior from time to time. On November 20, 1894, and November 18, 1895, the Commission made reports to Congress of the condition of affairs in the Indian Territory, in respect of the manner in which lands were held by the members of the tribes, and the manner in which citizenship of both tribes was dealt with, finding a deplorable state of affairs, and the general prevalence of misrule.

In the report of November, 1895, the Commission, among other things, said:

"It cannot be possible that in any portion of this country government, no matter what its origin, can remain peaceable for any length of time in the hands of one-fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are, therefore, responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the territory this attempt of a faction to dictate terms to the whole has already reached its limit and if left without interference will break out in revolution."

And the Commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship and the manipulation of the rolls and procedure in Indian tribunals, said:

"The Commission is of the opinion that if citizenship is left without control or interference, to the absolute determination of the tribal authorities, with power to decitizenize at will, great injustice will be perpetrated and many good and law-abiding citizens reduced to beggary. And, further, the Commission is compelled to report: that so long as power in these nations remains in the hands of those now exercising it, further efforts to induce them by negotiations to voluntarily agree upon a change that will restore to the people the benefit of tribal property, and that security and order and government enjoyed by the people of the United States, will be in vain."

We have a right to assume that Congress, in view of these official reports that had just been made to it, with all of these conditions in mind, and also with the purpose of allotting these lands, by passing such legis-

lation as would insure rights to those who were entitled to same, passed the Act of June 10, 1896, which is as follows:

ACT OF JUNE 10, 1896.

For salaries and expenses of the Commissioners appointed under Act of Congress, approved March 3, 1893, to negotiate with the Five Civilized Tribes in the Indian Territory, the sum of forty thousand dollars, to be immediately available; and said Commission is directed to continue the exercise on the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them, and to report from time to time to Congress.

That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after hearing they shall determine the right of said applicant to be so admitted and enrolled: *Provided, however*, that such an application shall be made to such Commissioners within three months after the passage of this Act. The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes; and shall give due force and effect to the rolls, usages and customs of each of said nation or tribe; and, provided further, that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose rights thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this Act desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship,

and such court or committee shall determine such application within thirty days from the date thereof.

In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for, and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever, heretofore taken, where the witnesses giving said testimony are dead or now residing beyond the limits of said territory; and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong; and the rolls so prepared by them shall be hereafter held to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: Provided, that if the tribes or any person be aggrieved with the decision of the tribal authorities or of the Commission provided for in this Act, it or he may appeal from such decision to the United States District Court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the Court shall be final.

That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose rights may be conferred under this Act,and said rolls shall be and are hereby made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States Courts, as provided herein.

The Commission is hereby required to file the lists of members as they finally approve them, with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the list of members

to be filed with the Commissioner of Indian Affairs; and said Commission is further authorized to make a full report to Congress of leases, tribal and individual, with the area, amount and value of the property leased, and the amount received therefor, and by whom and from whom said property is leased, and is further directed to make a full and detailed report as to the excessive holdings of the members of said tribes and others.

It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said territory, and afford needful protection to the lives and property of all citizens and residents thereof.

We have set out the Act of June 10, 1896, fully, because we will have many occasions to revert to it in the consideration of these questions. Before we determine whether notice was indispensable to both nations under that Act, we deem it proper to determine what rights were conferred by these judgments; and, if any rights at all, were they such property rights as required notice to both nations? Whether these judgments simply conferred a bare contingent right, that did not mean anything, or whether they did or did not carry with them the right to participate in the tribal property ultimately. (Now, it is conceded by all parties that these persons who obtained their citizenship by virtue of these judgments, under the Act of June 10, 1896, acquired all the rights, and were entitled to all the benefits, of those Indian citizens whose citizenship was not in question.)

To determine this question we will see how these lands are held by the Choctaw and Chickasaw tribes, and in doing this we deem it proper to trace their title.

By virtue of stipulations contained in the treaty

of 1830, between the United States and the Choctaw Nation or Tribe of Indians, and, in lieu of certain property owned by the Choctaw Nation east of the Mississippi river, the United States, through the then President, John Tyler, after reciting some of the causes that led up to the treaty of 1830, made the following grant to the Choctaw Nation:

GRANT.

"To all to whom these presents shall come Greeting:

"Whereas, by the second article of the treaty, began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States, on the 24th of February, 1831), by the Commissioners on the part of the United States, and the Mingoes, chiefs, captains and warriors of the Choctaw Nation, on the part of said nation, it is provided that 'The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation,' a tract of country west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and to live on it: Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the Western boundary of the territory of Arkansas; thence north along that line to the beginning. The boundary of the same to agreeable to the treaty made and concluded at Washington City in the year 1825.

"Now Know Ye, That the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant unto the said Choctaw Nations, the aforesaid 'Tract of country west of the Mississippi river;' to have and hold the same, with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, as intended 'to be conveyed' by the aforesaid article, 'in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it' liable to no transfer or alienation, except to the United States, or with their consent.

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and seal of the General Land Office to be hereunto affixed. Given under my hand at the City of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and forty-two and of the Independence of theUnited States, the Sixty-sixth.

"By the President,
JOHN TYLER.
DAN'L WEBSTER,
Secretary of State.
JOHN C. SPENCER,
Secretary of War.
T. HARTLEY CRAWFORD,
Commissioner of Indian Affairs.

"Recorded. Volume 1, Page 43.
J. WILLIAMSON,
Recorder of the General Land Office.

"Executed in the Bureau of Topographical Engineers.
JOHN J. ALBERT,
Col. Corps T. Engineers."

Then, in 1837, a treaty was made by the Choctaw and Chickasaw Nations, and in Article I of the treaty, we find this language:

"It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country" (especially meaning the country that had been granted to the Choctaws by virtue of the treaty of 1830) "to be held on the same terms that the Chocktaws now hold, except the right of disposing of it which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation."

In Article III, of the same treaty, we find this language:

The Chickasaws agree to pay to the Choctaws, as a consideration of these rights and privileges the sum of five hundred and thirty thousand dollars," etc.

Then we find in 1855 a treaty entered into by and between the United States and the Choctaw and Chickasaw tribes of Indians. (This seems to be the first treaty made where the United States and the Choctaw and Chickasaw Nations were all parties.) It seems by the preamble of that treaty that strife and dissension had sprung up between the two nations.

In Article I, of the treaty of 1855, is found the following:

"The following shall constitute and remain the boundaries of the Choctaw and Chickasaw county."

And then we find this language in the same article:

"And pursuant to an Act of Congress, approved May 28, 1830, the United States do hereby for-

ever secure and guarantee the lands embraced in the said limits to the members of the Choctaw and Chickasaw tribes, and heirs and successors, to be held in common, so that each and every member of either tribes shall have an equal and undivided interest in the whole."

And we find this provision therein:

"*Provided, however*, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct, or abandon the same."

Then article two, of this same instrument, sets apart a district for the Chickasaws, giving the boundaries thereof; and article three provides that the remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district.

Article five provides that the members of either the Choctaw or Chickasaw tribes shall have the right freely to settle within the jurisdiction of the other, and shall thereupon be entitled to all the rights, privileges and immunities of citizens thereof. Article eight provides that, in consideration of the foregoing stipulations, and immediately upon the ratification of this convention, there shall be paid to the Choctaws, in such manner as their national council shall direct, out of the national fund of the Chickasaws, held in trust by the United States, the sum of one hundred and fifty thousand dollars. And, in consideration of the relinquishment of claims to lands held by these two nations west of the Mississippi river, the United States, in article ten of said treaty, agrees to pay the Choctaws the sum of six hundred thousand dollars and the Chickasaws the sum of two hundred thousand

dollars; and by article fourteen of this treaty of 1855, the United States further agreees to protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons, in opposition to their jurisdiction and laws.

In 1866 another treaty was entered into by the Choctaws and Chickasaws and the United States, by which the Choctaws and Chickasaws, jointly, ceded to the United States Government a part of the territory that had been conveyed to them by grant, in consideration of three hundred thousand dollars, paid by the United States to the two nations. Article six, of the treaty of 1866, providing a means by which a right of way through these lands should be acquired, expressly stipulates that the price to be paid for the lands taken for such right of way, should be agreed upon between the Choctaw and Chickasaw nations and the company and companies seeking such right of way, and to be approved by the President of the United States.

In article eleven, of the treaty of 1866, this provision is found:

"Whereas, the lands occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and the said nations, of June 22, 1855, is held by the members of said nations in common under the provisions of said treaty; and whereas, it is believed that the holding of said land in severalty," etc.

In article fifteen of the same treaty, after providing for the selection of seats of justice, and lands for the endowment of schools, colleges, etc., this language is found:

"* * * At the expiration of a time therein named, the selection which is to change the tenure of land in

the Choctaw and Chickasaw nations from a holding in common to a holding in severalty. * *"

In article seventeen, of the treaty of 1866, after providing that the missionaries who had come to this country should not be deprived or interfered with in the continued occupation of their several missionary establishments; and providing, further, that should any missionary, who had been engaged in missionary labor for five consecutive years prior to this treaty in the nations, or either of them, or three consecutive years prior to the civil war, and who having absented himself from said nation, may desire to return, it is provided that such missionary be allowed to select a quarter section of land for a permanent home for himself and family. And in the same article granting lands to religious societies and denominations, it is provided that no land therein granted shall ever be sold or otherwise disposed of without the consent of both nations, and the approval of the Secretary of the Interior.

So it will be seen that in the treaty between the two nations in 1837, it is expressly provided that lands shall he held in common by the two nations. By the treaty of 1855, between the two nations and the Government, in is expressly provided that such lands shall be held in common, with this further explanatory provision, "so that each and every member of either tribes shall have an equal, undivided interest in the whole," with a further provision that no part thereof should be sold without the consent of both tribes. And in the treaty of 1866 the same conditions and limitations are incorporated, as were the former treaties referred to.

It is a significant fact that in all these treaties, wher-

ever land is mentioned, it is expressly provided that it is held in common by these two tribes. It is a further significant fact that wherever any provision is made for any disposition of the lands, it is provided that the price to be paid for same should be agreed upon between the two nations; and the disposition of any of the lands, before taking place, is to be agreed upon by the two nations. Even in the lands donated to the missionaries, who came here and administered to the spiritual needs of the Indian, and endured hardships, perils and dangers incident to such residence at that time, the Indian while recognizing that wholesome gratitude that must be commended, was so cautious as to the distribution of his property, ingrafted into that treaty that the lands therein granted should not be disposed of except by and with the consent of both nations. When the United States purchased a part of their territory under the treaty of 1866, it purchased the same not from the Choctaws alone, nor from the Chickasaws alone, but from the Choctaws and Chickasaws, and paid the two tribes therefor three hundred thousand dollars.

We have set out the provisions of these different treaties because we consider it important. And, after a careful consideration of the provisions of these treaties, and the legislation above referred to, is there any questioning the fact that this land is held in common by these two tribes? And that each and every member of these two tribes of Indians owns an equal undivided interest in the lands conveyed under the treaty of 1855, and which is now conceded to be all the lands embraced in the territory known as the Choctaw and Chickasaw Nations, in the Indian Territory, except that part heretofore disposed of by them?

And the further fact that no part thereof has ever been disposed of without their joint consent? These treaties mean that or they do not mean anything.

That question being settled our next inquiry is, what rights, if any, did these judgments confer? It is contended by the defendants in this case that they did not confer such rights of property as would require those who were to be affected by the judgments to have notice of the proceedings. We have shown by the legislation of Congress, heretofore set out, the great purpose of Congress in sending this Commission to the Indian Territory, known as the Dawes Commission, was to negotiate with the Indians looking to an allotment of the lands to the individual Indian in severalty, so that a State might be ultimately created, and to secure to each and every Indian in these two nations a sufficient quantity of land to meet his needs. This legislation further shows that this Commission could not form any agreement with the Indians that would accomplish that purpose. The Commission reported these facts to Congress, and the Act of 1896 was passed, we may assume, in consequence of these reports.

The Commission, under this Act, was authorized and directed to proceed at once to hear and determine the application of all persons who might apply to it for citizenship in any of the said nations, and, after such hearing, they shall so determine the rights of said applicants to be admitted and enrolled. It was necessary before the allotment took place that the applicant should be admitted as a citizen of either one of these tribes: if he was a Choctaw, he must be admitted as a Choctaw citizen: if a Chickasaw, he must be admitted as a Chickasaw citizen. And then, after he

was admitted, the Act directed that the Commission should put him on the roll. We might ask the question, what was the purpose of this? Why should he be admitted as a citizen and placed on the rolls? Did the Congress of the United States pass this Act simply to allow a man to be admitted as an Indian citizen when it conferred no rights? was it simply to subject the applicant to tribal laws, etc.? or, did it pass this act for the purpose of seeing who the real Indian was, and placing him on the rolls, so the allotment might take place and the lands be divided in severalty, as it had expressed in the legislation above referred to, was its great desire?

When the applicant was admitted he was placed on the rolls, and then he became entitled to all benefits enjoyed by the Indian whose rights were not in question. Then, did he not become entitled to his individual interest in the common estate, as soon as the same was allotted? We are forced to answer this question in the affirmative.

It is admitted by the defendants that these various parties, who were admitted to citizenship under these judgments, are now in possession of large tracts of land that belong to these two nations. They have enjoyed the benefits, the rents, and profits of these lands since the rendition of these judgments; and they went into possession of the same by virtue of the judgments so obtained under the Act of June 10, 1896. Then we might ask, how can it be contended that these judgments did not confer property rights?

Upon the question as to the rights conferred by the admission of a person as a citizen of these two tribes, the learned Judge of the Central District of the Indian Territory, who tried these cases in said District under

the Act of June 10, 1896, in his opinion in the case of F. R. Robinson vs. Choctaw Nation, when he came to discuss the rights of a white man, who had been admitted to citizenship by virtue of marriage with an Indian woman, uses this language: "The marriage had vested a title to the lands in him."

Also the learned Judge of the Southern District of the Indian Territory, who tried these citizenship cases, under the Act of June 10, 1896, supra, when he came to discuss what rights were conferred upon a United States citizen by his marriage to a Choctaw or Chickasaw woman, and thereby acquiring citizenship in the tribe, uses this language: "Besides it (meaning marriage) is supposed to carry with it certain property rights."

Chief Justice Fuller says in the Stephens case, above referred to, "these are not absolute vested rights," but we are bound to conclude that they were such rights as gave the applicant, when he was admitted and enrolled, rights in common property. Then, if that be true, was he seeking such right when he made application as would require, under the law, notice to the adverse party, or those who held the property in common, that their property was about to be diminished? that an estate was about to be carved out of the whole? In fact, was not enrollment, as here involved, but a step, and a vital one, looking to the partition or condemnation, so to speak, of a part of the common property of the two nations, the Choctaws and the Chickasaws?

We understand the general rule in equity cases, with reference to parties, to be in accordance with the fundamental principles of justice, that all persons interested in the object of a suit, and whose rights will be directly

affected by the decree, must be made parties to the suit. (Exceptions to this rule have been admitted none of which apply in this case); but in every case there must be such parties before the court as to insure a fair trial of the issues in behalf of all.

McArthur vs. Scott, 113 U. S., page 1031.

All who are interested in the decree shall be made parties to the proceedings, but the rule is not without exceptions, and it does not apply where parties cannot be found, and where great inconvenience would result from its application. Where a person is interested or involved in a suit he should be made a party.

Danbridge vs. Washington, Ex., 2 Peters, p. 454.

In other words, we understand the rule to be, all those whose presence is necessary to a correct determination of the entire controversy *must* be made parties.

Justice Livingston, in delivering the opinion of the court in the case of Marshall vs. Beaverly, 5 Wheat., 313, uses this language:

"It is not the course of courts of equity to make a decree which is operative directly upon the parties in interest without affording them an opportunity of being heard."

We could quote a great many decisions bearing out this principle, but it is a principle so well settled that we need not spend any time thereon.

Here is a large body of land belonging to these two tribes. Congress in its various acts, supra, said that it desired to allot this land in severalty. Was the Choctaw nation interested in who was made a Chickasaw citizen? Or was the Chickasaw nation interested

in who was made a Choctaw citizen? Most assuredly it sems to us they were. The natural effects of these judgments was to deprive them of a part of their lands, then, under the well established principles of law, was it not necessary, when the applicant came and presented his application, and an allowance of same, and putting him on the rolls, had the effect of his sharing in the distribution of these lands, then, naturally, why was he not interested in these proceedings so vital to his rights?

The counsel for the defendants contend that the proceedings in this case were on a parallel with the proceedings for naturalization. We can see no kinship between the two. The defendants contend that the decree of the court declaring a person a citizen under the naturalization laws entitle him to preempt land and acquire a homestead in the public domain. That may be true. The Government is then dealing with its own property, and the rights of no third parties intervene, but here the Government is dealing with its wards, and with people who own this property. The Government of the United States has not only given them a grant to it, but by solemn treaty has said: "This is your property; hold it in common. It is yours as long as you and your heirs exist, unless you abandon the same." The Government has not only said this to the Indian, but further, that it will protect him from other Indians and white people who attempt to invade his rights.

The defendants argued with considerable earnestness, that, under the Act of June 10, 1896, if notice was necesasry to either nation, notice to one was sufficient, and that service on both nations was not

necessary, because citizenship had been conferred by each of these nations without the concurrence or intervention of the other; and that the Act of June 10, 1896, directed the Dawes Commission, that in determining all such applications the Commission should respect the laws of the several nations or tribes. That contention is met by the conceded fact that these nations had become so corrupt, and many people who were entitled to citizenship had been deprived of their rights, and that citizenship had been conferred upon those who were not entitled to it. The Congress of the United States, we have a right to assume, with a knowledge of these facts, and doubtless remembering the provisions of the treaty of 1855, stipulating that the United States Government shall protect these Indians in their rights from invasion of intruders, took from these tribes the right to confer citizenship and placed it in the hands of the agents of the Government, at the same time admonishing these agents to respect, in determining these citizenship questions, all laws of the several nations or tribes. Had Congress stopped there, there might have been some force in this contention, but it went further, and provided that, not withstanding the Commission should respect the laws of the several nations or tribes, added, "not inconsistent with the laws of the United States and all treaties with either of said nations or tribes."

In other words, it directed the Commission to respect the laws of the several nations or tribes, providing the same were not inconsistent with the laws of the United States.

Now, was conferring citizenship by one nation, and thereby diminishing the property of the members of the other nation—that being the ultimate result—

without any notice to that nation affected by the bestowal of such citizenship, inconsistent with the laws of the United States? Was that not depriving the members of that nation, who had a common interest in the lands of both nations, of their property rights without due process of law? We are forced to the conclusion that it was.

Congress did not stop here, but it went further and provided and directed, in the Act of June 10, 1896, the Dawes Commission in the performance of such duties, shall have power and authority to administer oaths, to issue process and compel the attendance of witnesses, and to send for persons and papers and all depositions and affidavits, in any form whatsoever heretofore taken, where the witnesses giving such testimony are dead, or now reside beyond the limits of said Territory, and further directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, and to protect any of said nations from fraud or wrong. Congress, being so jealous of the rights of these "once powerful but now dependent people," enjoined upon this Commission to use every fair and reasonable means in determining the rights of citizenship or to protect the Indian from fraud or wrong. Was it not reasonable to serve notice on both of these nations, so they could have come into court and contested the rights of those who were seeking to gain an interest in their common property?

As we have said before, the general rule is that all those whose rights are affected by the decree should be made parties to the action; that being true, we are forced to the conclusion that Congress did not intend

to prescribe a different rule to be followed when dealing with a helpless and dependent people.

The defendants, in their learned and exhaustive argument, laid down this proposition, and seemed to place considerable stress thereon, that the Act of June, 1896, in not providing for notice, was equivalent to a declaration by Congress that no notice was necessary in order to carry out its purpose in making a roll of citizenship in the tribes. We do not think that can be the law, but think, in the absence of a declaration in the statute upon this point, that Congress assumed, when it passed the Act of —June 10, 1986, and was silent upon this point, that the Commission, as well as the courts, would follow the well-established rules and principles of law in these citizenship proceedings that had been conferred upon the Commission and courts to determine. Congress directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong. Mark the language. How could they be protected when they were not given the opportunity of being heard when a part of their property was about to be taken?

The defendants insist that the Supreme Court in the Stephens case, above cited, held that Congress had the power to authorize the Commission to make the rolls in the manner provided for in the Act, and that this is equivalent to a declaration by the Supreme Court in that case, that in making the rolls notice to the tribes was not indispensable. In insisting upon this contention, they, however, admit that the question as to whether notice had been given to both tribes, or either tribe, or as to whether such notice was necessary,

was not presented to the Supreme Court. We assume therefore, that the Supreme Court did not pass upon that question, and especially so when the learned Chief Justice, in delivering the opinion in the Stephens case, expressly says in that opinion that the Court had confined itself to the question as to the constitutionality or the validity of the legislation. If the question of notice had been presented to the Supreme Court, and that Court had passed upon that question, of course, this Court would be bound by its decision.

It is admitted that the question as to whether notice was indispensable to both tribes in the proceedings under the Act of June 10, 1896, supra, was never raised, either before the Dawes Commission or upon appeal to the United States District Courts for the Indian Territory, and, in fact, was never raised in any legal proceeding except in this case.

We deem it just to the Dawes Commission, and also to the United States Courts, who tried these cases, to say this much.

In the answer of Julia London, et als., filed in this cause, it is alleged that this court has no jurisdiction or power to entertain the bill for the purpose of setting aside, cancelling and annulling the judgments of the United States Courts for the Indian Territory, which are set forth in the bill in this case; and they deny that Congress had the right to pass the Act of July 1, 1902. Hence they contend that the Act of July 1, 1902, is in violation of the Constitution of the United States. These defendants, who set up this question in their answers as well as many of the other defendants in this proceeding, filed a demurrer to the bill in this case, attacking the validity and constitutionality of

this legislation, upon the same grounds as are set up in this answer.

After a full and exhaustive discussion of this matter, covering a period of five days, this Court overruled the demurrer so filed, and all of them. Therefore, without going into a full discussion of this matter again, we now hold that Congress did have the right to pass the Act of July 1, 1902, and every provision thereof; and that the same is not in conflict with the Constitution of the United States, or any of its provisions.

Having determined the first legal question involved in this proceeding, we now come to a consideration of the second proposition: Whether the proceedings in the United States Courts in the Indian Territory, under the Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial *de novo* of the question of citizenship.

The Act of June 10, 1896, with reference to appeals in these cases from the Commission, known as the Dawes Commission, contained this proviso: "Provided, that if the tribe or any person be aggrieved with the decision of the tribal authorities, or the Commission provided for in this case, it or he may appeal from such decision to the United States District Court; provided however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final." It will be observed that there is nothing in the statute itself, declaring in terms that such appeal shall be tried *de novo*, and, in fact, there is no prescribed mode of procedure specially set out in the Acts as to the matter of Appeals. Then we are to determine what

Congress meant when it said by the Act of June 10, 1896, that the party aggrieved should have the right of appeal to the United States Court; that is, what is meant by the word "appeal," accompanied by the other language of the Act. In other words, what kind of an appeal was applicable to the case in hand, as to the procedure to be pursued in determining the case in the appellate tribunal?

The defendants contend that, inasmuch as there was no provision in the Act of June 10, 1896, requiring the cases *not* to be tried *de novo*, Congress, by the act of June 10, 1896, intended that the trials should have been *de novo*. In other words, that if Congress had intended that the United States Courts for the Indian Territory, in the trial of these appeals from the Dawes Commission, should have been confined to a review of the case, it would have said so in the Act itself; and they further contend that the only jurisdiction the United States Courts had, to try cases appealed to them, was to try them *de novo*. In support of their contention, defendants cite the practice of the United States Courts in the Indian Territory with reference to appeals from mayors of incorporated towns, and United States Commissioners therein, showing that in all such appeals the trials are had *de novo*.

To pass upon this contention we deem it necessary to refer to the Acts of Congress authorizing appeals from mayors and commissioners in the Indian Territory, for the purpose of ascertaining whether or not such Acts of Congress prescribed how such appeals shall be tried when they reach the United States Court and in doing so we shall set out as much of these statutes as we think bear upon this point.

An Act entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Courts in the Indian Territory, and for other purposes" was passed by Congress, May 2, 1890, and is found in the United States Statutes-at-Large, Vol. 26, Chap. 182, page 81, in which, after providing for the appointment of commissioners and designating what the qualifications of these commissioners shall be, etc., we find this provision:

"The provisions of Chapter 91, of the Laws of Arkansas, regulating the jurisdiction and procedure before the Justices of the Peace are hereby extended over the Indian Territory * * *."

And then, in providing how appeals shall be taken from these commissioners: It is further provided that appeals may be taken from the final judgments of said commissioners to the United States Courts in the Indian Territory, in all cases, and in the same manner, that appeals may be taken from the final judgments of Justices of the Peace, under the provisions of said Chapter 91.

The Chapter 91 which is referred to, is found in Mansfield's Digest of the Laws of Arkansas; and in order to determine what procedure is prescribed in appeals from Justices of the Peace under the Arkansas Statutes, as set out in Chapter 91 of Mansfield's Digest, we have examined that provision of the Arkansas law under the head of "Appeals" in that chapter. After providing that any person aggrieved by any judgment rendered by any Justice of the Peace, etc., and after providing how the appeals shall be taken, we find this provision:

"Upon the record of the Justice being filed in the Clerks' office, the Court shall be in possession of the case and shall proceed to hear, try and determine the same anew, upon its merits, without any regard to any error, defect or imperfection in the proceedings of the Justice."

With reference to appeals from Mayors, we find the same provision as to appeals from Justices; and it will be seen that in the case of appeals from Commissioners of United States Courts in the Indian Territory, the statute itself prescribes that the trials shall be *de novo*, and not confined to a review.

The defendants in their oral arguments, as well as in their printed briefs, cite the case of the United States vs. Ritchie, 58 U. S., page 524, and seem to rely upon that decision largely in support of their contention, that Congress, by the Act of June 10, 1896, intended that these appeals should be tried *de novo*, and the Court should not be confined simply to a review of the action of the Dawes Commission. In fact, the Judge for the Central District of the Indian Territory seems to have based his authority to try these appeals from the Dawes Commission, under the Act of June 10, 1896, upon the decision of the United States Supreme Court in the Ritchie case, supra. We think we are warranted in saying this from the language found in his opinion, as appears, beginning on page 110, in the report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, which is as follows:

"There are upon the dockets of this Court, appealed from the Commission to negotiate with the Five Civilized Tribes, known as the Dawes Commission, two hundred and forty-one cases, involving the rights of citizenship in the Choctaw Nation of about two thousand

five hundred applicants. All of these cases have been by my predecessor, Judge Lewis, placed on the equity side of the Docket, and in the case of Mary A. Sanders, No. 63, a motion to transfer to the law side of the docket was filed and argued, and by him overruled. It is not my purpose in these cases to disturb or go back and open up questions already decided, but to adopt the past rulings of the Court, and to proceed as rapidly as possible to a final disposition of them. In passing I will remark, however, that it seems to me that the peculiarity of these cases, the many suits brought by persons having a common interest and a common purpose against the same defendants, the difficulties of enforcing the rights by judgment of law, and the many equities claimed by both parties to these suits, make them proper cases for a court of equity.

"The question of the jurisdiction of this Court to hear and determine these cases has been raised by the pleadings. The counsel on neither side, however, has seen fit to press this question or to point out, either by brief or oral argument, the reasons for this contention. The statute giving the Court jurisdiction is plain, and I know of no constitutional objections. It has been said, however, that Congress does not possess the power under the Constitution to give to the courts of the United States appellate jurisdiction over the final orders and awards of commissions and other such tribunals. This very question was raised in the case of the United States vs. Ritchie, decided by the Supreme Court of the United States, and reported in Vol. 58, United States Supreme Court Reports, page 524. In that case the proceedings were originally commenced before a board of commissioners to settle private land claims in California, under Act of Congress of March 3, 1851. Provisions were made by the Act, at the suit of the losing party, for an appeal to the United States District Court for the Northern District of California. The board decided the case in favor of the claimant and against the government. The United States appealed in accordance with the provisions of the statute, afore-

said District Court, where it was again tried *de novo*, and an appeal regularly taken to the United States Supreme Court. In that Court the question of the jurisdiction of the District Court to try the case was raised. The contention is stated in the opinion."

Upon an examination of the Act of Congress referred to by Judge Clayton, under the provisions of which the decision of the Supreme Court was based, it will be found that the Act itself provided that upon an appeal from the commission to settle the private land claims in California to the United States Court, in section 10 thereof, that the United States District Court for California should proceed and render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken upon the order of said court in such appeal. So it will be seen in this case, as well as in the cases upon appeal from the United States Commissioners in the Indian Territory, that the Acts themselves provided for a trial *de novo*. It will further be seen, by referring to the Act of June 10, 1896, supra, under which the United States courts were proceeding, contained no such provision or direction; it simply provided, that if the tribe or any member be aggrieved by the decision of the tribal authorities, or the Commission provided for in this case, it or he might appeal from such decision to the United States District Court: *Provided, however*, that the appeal shall be taken within sixty days, and the judgment of the court shall be final. But it is claimed that the Supreme Court of the United States, speaking through Chief Justice Fuller, in the case of Stephens vs. Cherokee Nation, 174 U. S., page 445, has decided unmistakably that such trial was to be

had *de novo*. If this contention was sound, of course, this Court would be bound thereby. But let us look at the language used by the learned Chief Justice in delivering the opinion in the Stephens case. His language is as follows:

"As to the first of these objections, conceding the constitutionality of the legislation otherwise we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated 'appeals' for want of a better term, to judicial tribunals for examination and determination *de novo*."

Now, we may ask, what was the first objection to which the Chief Justice referred in stating his views above quoted? It was stated by him thus:

"The question arises, whether the judgments made final by the statutes are the judgments of that Court in the several districts delineated by the Act of March 18, 1895, or of the appellate court herein provided for, which may be referred to later on, since it is objected to in the outset that no appeal from the decisions of the Dawes Commission, or of the tribal authorities, could be granted to the United States Court; and furthermore, that at all events it will not be competent for Congress to provide for an appeal from the decrees of the United States Courts in the Indian Territory, after such decrees have been rendered and the term of court expired."

Now, it will be seen here, the learned Chief Justice does not determine that the right and power of appeal, which is treated of above, does as a matter of fact, conclusively carry with it, in the very terms of the

Act conferring the right and power; the right to prosecute an appeal *de novo;* or, that it orders or declares by any act or any language, that can bear such a construction, that the procedure on appeal is to be a trial *de novo*; or that it specifies what the procedure in the appellate court shall be. In addition, the Chief Justice in his decision in the Stephens case, distinctly declares that the United States Supreme Court had only power in determining that case, to hear such appeal as he was passing upon, under the Statute of 1896, in so far, merely and entirely, as the constitutionality of the act or acts was concerned; but the question of the right of appeal *de novo*, as was claimed existed to the District Courts of the Indian Territory, under the Act of June 10, 1896, did not and does not involve any constitutional questions. The learned Chief Justice says that Congress may pass an act constitutionally, commanding a trial *de novo*, in the court above and goes no further.

It will be observed that the Chief Justice did not say that the Act of 1896 meant that the appeal should be *de novo*, but says that Congress had the right to pass such an act.

The case of Kimberlin *vs.* Commission to the Five Civilized Tribes, decided in the Circuit Court of Appeals for the 8th Circuit, and which is found in the C. C. A. Vol. 44, Page 109, where some two years after the expiration of the time fixed by the Act of June 10, 1896, within which the Commission is authorized to receive applications for citizenship, Mary Jane Kimberlin filed her application and asked that it be passed upon. The Commission held that it had no power to receive or pass upon applications after September 10, 1896. The applicant applied to the United States

Court for the Southern District of the Indian Territory, for a writ of mandamus to compel the Commission to entertain her application and admit her. The court denied the petition, and an appeal was taken to the Court of Appeals for the Indian Territory. Its decision was an affirmance of the decision of the District Court, and an appeal was taken to the United States Circuit Court of Appeals for the 8th Circuit. Judge Sanborn, in delivering the opinion, among other things, says, in speaking of the right of appeal, as given in the Act of June 10, 1896.

"It provides for the speedy determination of the questions presented by the various applications, and gives each applicant the right to a *review* of the action of the commission by an appeal to the Federal Court."

That is a looking over, of any appeal to the United States District Courts of the Indian Territory, in order to determine if any error was committed by said Commission as to law or fact, which requires correction. Judge Sanborn further says in this opinion:

"It is conceded that the Commissioners are executive officers; it is not their sole duty or chief function to hear and determine the controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties, who may apply to them for membership in the Five Nations, they are vested with judicial power by the Act of Congress; they have authority * * * * to use every fair and reasonable means within their reach for the purpose of determining such citizenship, and above all they are empowered to determine the application of all persons who may apply to them for citizenship. This grant of power is plenary; it vests the authority and imposes the duty on the Commission to hear and decide every question of law and fact, which is material

to the rights of the applicant for enrollment as a citizen of the nation."

It may further be said, as bearing on the plenary powers of the above mentioned Commission, that the Act of June 10, 1896, further provides, following the portion above construed in the Circuit Court of Appeals, defining the powers of said Commission to hear and determine the question of citizenship, or to protect any of said nations from fraud or wrong. That is, everything in the power of said Commission was mandatorily directed by Congress to be done, and every reasonable step it could take, in order, as far as lay in its reach, to protect any of said nations from not only fraud, but from any wrong.

It thus appears that in this decision of the Court of Appeals, it is stated upon fair construction, that the Commission had judicial powers of a plenary nature. As to procedure, where does the language giving the right of appeal from the decisions even intimate that a review of the same question of law or fact are to be heard *de novo*, either as a matter of procedure or of right, or recommended, even remotely, as we can see? So, then, here we have a commission having plenary rights and powers given by positive law and clear language, to hear and determine all questions of law and fact which might come before it under the terms of the law conferring such jurisdiction, and the right of appeal, as expressed in the Act of June 10, 1896, from its decisions, avoiding everything going to declare that the appeal should be heard *de novo*, as did the statute involved in the Ritchie case, and also the statute governing the appeals from Commissioners of the United States Court, cited by the defendants,

giving a right of appeal to a trial *de novo*, or any language specifying the procedure to be had on such appeal in the court above. It follows, then, that we must determine how such an appeal should have tried in the United States District Courts of the Indian Territory, by interpreting fairly the language of the Act of June 10, 1896, giving appeal to the reviewing court of the last resort. From the language of the Act conferring plenary powers as a judicial body upon the Dawes Commission, supra, and also giving a right of appeal from its decisions, as the clause of the act giving the appeal does not distinguish it in any way perceptible to us from the ordinary court having plenary powers to try all cases as to law and fact, of which the Act of Congress gives it jurisdiction, it appears clearly that an appeal is to be granted in an ordinary way and manner, as if the appeal had been taken from an ordinary State Circuit Court to a Court of Appeals or from any similar court having plenary powers to try questions of law or fact, to an appropriate appellate court, for review of the action of the court below, having such plenary powers over matters to be heard under its jurisdiction originally.

The members of the Dawes Commission were appointed by the President and confirmed by the United States Senate, and having larger powers than those conferred on the Commissioners of the United States Courts anywhere, and, therefore, no parallel can be drawn with the powers of the United States District Courts of the Indian Territory, on appeal from such tribunals, the mere creation by appointment of the District Judge, with that possessed by the District Court on appeal from the Dawes Commission. The United States District Court Commissioner is the

creation of a direct legislative act of Congress, but having limited powers compared with those conferred upon the Dawes Commission by the Act of Congress giving it such vast powers, and especially under the Act we are now considering, to try these citizenship cases; and dignifying the members thereof not only with a grant of great power, but paying them salaries as great as the Judges of the District Courts, and their appointment by the President requiring the Senate's concurrence.

In considering the questions raised by the pleadings, we have considered all that part of the constitutions of the Choctaw and Chickasaw Nations, or tribes of Indians, and all their laws passed by their legislature and general council from time to time; and also all treaties made and entered into by said tribes with the United States, as well as those treaties entered into between the two tribes; and also the rules of the Commission to the Five Civilized Tribes, in existence in 1896, bearing upon the points at issue, which will be seen by reference to the opinion in this case.

So that in all the various aspects in which this question is to be viewed, considering the case of Kimberlin against the commission to the Five Civilized Tribes, supra, and all the statutes and decisions we have been able to examine; in further considering what dignity and power is conferred on the Dawes Commission, as to judicial and other powers, and the method of their appointment and confirmation, we are led to the irresistible conclusion that the appeals from the Dawes Commission, under the Act of June 10, 1896, to the United States Court in the Indian Territory, should have been confined to a review of the action of the commission upon the papers and evidence submitted to

such commission and should not have extended to a trial *de novo* of the question of citizenship. We think every fair construction and intendment of the language of the Act, giving the right of appeal to the United States Courts for the Indian Territory leads to this conclusion; and that grave and serious prejudicial error must necessarily be presumed, because the United States Courts for the Indian Territory in trying such appeals, proceeded without warrant of law, and therefore the judgments they rendered in the cases at bar, as in all cases where the parties are similarly situated, can not be upheld and should be annulled and declared void.

And as a further confirmation that such ought to be the judgment of this court in this proceeding, the fact that if notice to both tribes was indispensable, and in the sense meant in the Act of July 1, 1902, it will be remembered that this word "indispensable" has reference as well to the ordinary practice in such cases where a joint and common interest in property is held, as here by both tribes of Indians involved in this case, and also it has reference to what should have been done by the Dawes Commission in carrying out the declaration of Congress properly as to the method of acquiring jurisdiction, and the procedure to be pursued by the Dawes Commission, as set out in the Act of June 10, 1896, and this view is further confirmed when it appears that Congress in the 31st Section of the Act of July 1, 1902, has termed the failure to give both tribes notice, and the hearing *de novo* by the United States District Courts of the Indian Territory, not prescribed by the Act giving right of appeal from the Dawes Commission to the District Courts for the Indian Territory, as irregularities claimed and insisted upon

by such nations, thus clearly indicating that the Congressional view was and is, that the Dawes Commission having failed to give proper notice of a reasonable kind to both tribes, holding common interests in the lands of a proceeding affecting their joint property rights, and the United States District Courts having tried the cases on appeal *de novo*, the Act of June 10, 1896, not ordering it, that such matters not only be matters considered irregular, in order that a decree may be made through this court, speaking to the subject that such irregularities having occurred, the judgments involved here should be annulled and vacated.

In the determination of the questions raised by the pleadings in this proceeding, we have confined ourselves to the two legal propositions raised by the bill, in accordance with Section 31 of the Act of July 1, 1902, under which this proceeding was instituted, deeming it unnecessary to go into the other questions that are raised by the several answers, because we consider a determination of the two propositions as decisive of all. So, in consideration of all the various aspects of this case, and being of the opinion that owing to the manner in which the lands are held by the two tribes, that notice to both tribes was indispensable; and being further of the opinion that the proceedings in the United States Courts in the Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to trials *de novo* of the question of citizenship, we are of the opinion, on account of the errors pointed out, that the judgments rendered by the United States Courts for the Indian Territory, under the Act

of June 10, 1896, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill, as well as those who have come in and made themselves parties defendants, and all persons so situated, should be annulled and vacated, and it is, therefore, so ordered.

We concur fully, and entirely in what is written, said, and declared by Chief Judge Adams, in the opinion herein rendered and filed, both as to the reasoning, the conclusions arrived at, and the matters passed on and adjudged.

WALTER L. WEAVER,
Associate Judge.
HENRY S. FOOTE,
Associate Judge.

EXHIBIT B

'The Choctaw and Chickasaw Nations or Tribes of Indians,
Plaintiffs,
vs.
J. T. Riddle, D. S. Riddle, L. A. Riddle, Elizabeth Casey, Joshua Casey, Andrew B. Hill, L. T. Hill, James W. Balthrop, T. D. Arnold, J. H. Bratcher, for Themselves and as Representatives of all Persons Similarly Situated, Claiming to be Members of the Choctaw and Chickasaw Nations, by Virtue of Alleged Decrees of the United States Court for the Central and Southern Districts of the Indian Territory Sitting Respectively at South McAlester and Ardmore, and Commonly Known as Court Claimants Defendants.

This cause coming on further to be considered, and it appearing to the court, that the paper writing purporting to be the judgment of this court herein, heretofore filed with the clerk, does not conform to the written opinion announced and rendered by the court, which has been filed and entered as a part of the record herein it is therefore ordered, adjudged and decreed by the court, that said paper writing purporting to be the judgment of this court herein, of date the 17th day of December, 1902, be and the same is hereby amended, and the following is the true judgment, intended to be entered by this court herein of that date, and the same is hereby entered of record as the judgment of this court in this case, in accordance with the said opinion and that the same be so filed,

nunc pro tunc as of date, the 17 day of December, 1902, as follows, to wit:

This day this cause came on to be heard, and having been fully argued by counsel, was submitted to this court on the pleadings, exhibits and testimony, upon consideration whereof, the court finds:

That due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity of law;

That said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of said defendants, who desired to be heard, were heard;

That notice to each of said Choctaw and Chickasaw Nations or tribes of Indians of the proceedings in the United States Court in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, was indispensable;

And the court further finds that in said proceedings, in the United States Court in the Indian Territory, and said courts proceeded to hear and determine said causes *de novo*, and did not confine the same to a review of the proceedings had before the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission;

That by reason of each of said facts, to wit: That the proceedings in said United States Courts, were had without notice to each of said tribes or nations when notice of each of said nations was indispensable, and that said United States Courts tried said causes *de novo* when their action should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence sub-

mitted to such Commission, all of said proceedings, decrees and decisions, of said United States Courts in the Indian Territory, admitting any and all persons to citizenship or enrollment, as such citizens in said nations or tribes of Indians or either of them, ought to be set aside, annulled and vacated.

It is therefore, Ordered, Adjudged and Decreed, that all of said judgments, decrees and decisions, rendered by the United States Courts in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants, named in the bill in this proceeding, as well as to those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid, in favor of all persons similarly situated, are set aside, annulled, vacated and held for naught.

(Signed) SPENCER B. ADAMS,
Chief Judge.
WALTER L. WEAVER,
Associate Judge.
HENRY S. FOOTE,
Associate Judge."